

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

MAY 28 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2009-0091
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MANYELLE DESHAWN CLAY,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20081286

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan

Tucson
Attorneys for Appellee

Wanda K. Day

Tucson
Attorney for Appellant

ECKERSTROM, Presiding Judge.

¶1 Following a jury trial, appellant Manyelle Clay was convicted of possession of a deadly weapon by a prohibited possessor and sentenced to an enhanced, presumptive prison term of ten years. On appeal, he argues the trial court abused its discretion by limiting his cross-examination and denying his motion for a judgment of acquittal. We affirm for the reasons set forth below.

Factual and Procedural Background

¶2 “We view the evidence in the light most favorable to upholding the jury’s verdict.” *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). On March 14, 2008, police officers were looking for Clay and conducting surveillance at an apartment complex where he had been seen. After observing Clay get into the rear passenger-side seat of a parked car, officers blocked the vehicle with their own. The officers then approached the vehicle on foot with their guns drawn, loudly ordering its occupants to raise their hands. Helicia M., who was the driver and owner of the vehicle, immediately put her hands up, as did her boyfriend, who was sitting in the front seat. Clay, however, bent over and appeared to manipulate something by his feet on the floor of the vehicle. When officers again ordered him to put up his hands, he raised only his right hand and stuck it outside the window.

¶3 After detaining the three people in the car and obtaining Helicia’s permission to search it, officers discovered a .45 caliber handgun hidden underneath the front passenger seat. The gun had been concealed there under the rear passenger-side floor mat. The gun’s muzzle was pointed toward the front of the vehicle; its grip was pointed toward the rear. Samples of deoxyribonucleic acid (DNA) taken from the gun

were mixed, meaning more than one person had contributed DNA to the samples. An analysis of Clay's DNA revealed that he could not be excluded as a contributor. Statistically, twelve out of thirteen people in his ethnic group could be excluded by the analysis.

¶4 At trial, Helicia testified that when the police vehicle pulled up behind her, Clay essentially told her to, “[G]o, go, go, get out of here.” She further testified that neither she nor her boyfriend owned the gun found by police. Before cross-examination began, Clay informed the trial court in a bench conference that he intended to question Helicia about the knife and stun gun that were found in her purse on the night of the arrest. The court sustained the state's objection and precluded evidence of these weapons on the ground that it was irrelevant.

¶5 At the close of the evidence, Clay moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., arguing the state presented insufficient evidence to support a conviction because it had merely established his presence in the vehicle. The trial court denied the motion, and the jury subsequently found Clay guilty. After the court determined he had two historical prior felony convictions, it sentenced him to an enhanced prison term of ten years. This appeal followed.

Weapons Evidence

¶6 Clay first contends the trial court erred in precluding evidence of the knife and stun gun found in Helicia's purse. Specifically, he claims the ruling violated the rules of evidence as well as his rights secured by the federal and Arizona constitutions to cross-examine witnesses and present a defense. We review a trial court's evidentiary

rulings for an abuse of discretion. *State v. McGill*, 213 Ariz. 147, ¶ 40, 140 P.3d 930, 939 (2006).

¶7 As mentioned above, the trial court precluded evidence of Helicia’s other weapons on the ground it was “not relevant.” Rule 401, Ariz. R. Evid., defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Case law establishes that the threshold for relevance “is not particularly high.” *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988); *see State v. Adamson*, 136 Ariz. 250, 261, 665 P.2d 972, 983 (1983) (defining relevant evidence as that having “any basis in reason to prove a material fact in issue or . . . tend[ing] to cast light on the crime charged”).

¶8 Here, the fact of consequence was whether Clay had possessed the handgun found in the car. To make this factual determination, the jury was required to consider whether Helicia, or perhaps her boyfriend, actually had possessed the handgun that Clay was charged with possessing and whether her testimony on this point was credible. Although we acknowledge that numerous inferences could be drawn from the excluded weapons evidence, one possible inference it allowed was that Helicia was sufficiently concerned with her safety on the night of the incident that she was carrying multiple, potentially deadly, weapons for self-defense. This inference, in turn, made it more probable that Helicia also possessed the handgun found in her car. Thus, the evidence of Helicia’s other weapons made Clay’s defense that he did not possess the gun “more probable . . . than it would be without the evidence.” Ariz. R. Evid. 401. The trial court

therefore abused its discretion in finding the weapons evidence irrelevant and ruling it inadmissible on this ground.

¶9 On appeal, the state maintains that the other weapons had “no bearing” on any fact at issue in the case because “both weapons [were] . . . very different from a firearm.” But such an argument relates to the probative value and weight of the evidence, not its admissibility. In short, it was an appropriate fact for the jury to consider during its deliberations, not one to be accepted or rejected by a judge as a matter of law. As our supreme court has emphasized, trial courts must be mindful not to “bootstrap [themselves] into the jury box via evidentiary rules,” *State v. LaGrand*, 153 Ariz. 21, 28, 734 P.2d 563, 570 (1987), particularly when a criminal defendant’s constitutional rights are implicated.

¶10 Nevertheless, the trial court’s erroneous ruling does not require reversal in this case. Because the error here was not structural, it is subject to a harmless error review. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). “Error, be it constitutional or otherwise, is harmless if [a reviewing court] can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.” *Id.*

¶11 Here, when police officers surrounded the car, Clay urged Helicia to evade them and leave the scene. Then, rather than complying with officers’ commands to raise his hands, Clay bent over and appeared to manipulate something on the floor of the vehicle where officers discovered the hidden .45 caliber handgun. The DNA evidence collected from that gun, while not dispositive, strongly suggested that Clay had handled it. Given the strength of the circumstantial evidence against Clay and given that knives

and stun guns are indeed very different weapons and were found in a very different location, the excluded evidence concerning the knife and stun gun in Helicia's purse was comparatively trivial. We can say, beyond a reasonable doubt, that the court's error did not affect the jury's verdict.

Rule 20 Motion

¶12 Clay also challenges the trial court's denial of his Rule 20 motion for a judgment of acquittal. A court should grant a Rule 20 motion "only where there is no substantial evidence to warrant conviction." *State v. Fernane*, 185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995). This court "will find reversible error based on insufficient evidence only where there is a complete absence of probative facts to support a conviction." *Id.* "If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004), quoting *State v. Rodriguez*, 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996) (alteration in *Rodriguez*). Circumstantial evidence may constitute the substantial evidence necessary for a conviction. *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005).

¶13 Comparing his case to *State v. Miramon*, 27 Ariz. App. 451, 555 P.2d 1139 (1976), Clay contends the state's evidence was insufficient to establish he knowingly had possessed the handgun. In *Miramon*, this court reversed the drug conviction of a passenger who had been riding in a vehicle with two other people. *Id.* at 452, 453, 555 P.2d at 1140, 1141. The evidence established that when police officers were following the car, Miramon bent forward in the front passenger seat. *Id.* at 452, 555 P.2d at 1140.

After police officers stopped the vehicle, they instructed all three people to exit from it. *Id.* The officers then discovered a brown paper sack protruding from underneath the front passenger seat that contained fourteen smaller bags of marijuana. *Id.* When officers searched Miramon, they found two marijuana cigarettes hidden in his sock. *Id.*

¶14 On appeal, we reversed Miramon’s conviction for possession of marijuana for sale because there was no evidence establishing Miramon knowingly had possessed the brown paper sack.¹ *Id.* at 453, 555 P.2d at 1141. In so ruling, we reaffirmed the principle that a person’s mere presence where drugs are found is insufficient to establish possession, even when the person knows of the drugs’ presence. *Id.* We emphasized that, based on the police officers’ testimony, Miramon had not appeared to hide anything when he bent over in the front seat. *Id.*

¶15 Here, however, a police officer testified that it appeared as though Clay was manipulating something when he bent over, and the handgun discovered in the car had been covered by the rear passenger floor mat in the very area where he had been moving his hands. DNA evidence also strongly suggested Clay had handled the weapon. And his actions upon seeing the police—telling the driver to leave the scene and refusing to comply with police officers’ commands to raise his hands—further suggested that Clay had something to hide. Finally, the driver, Helicia, testified that she and the other occupant of the vehicle did not own the weapon. Thus, the state presented several pieces of circumstantial evidence, beyond Clay’s mere presence in the vehicle, to connect him to

¹We affirmed his conviction for simple possession of marijuana based on the drugs found in his sock. *Miramon*, 27 Ariz. App. at 453, 555 P.2d at 1141.

the weapon. Because there was substantial evidence to support the conviction, the trial court correctly denied Clay's Rule 20 motion.

Disposition

¶16 Although the trial court erred in limiting Clay's cross-examination, the error was harmless under the circumstances of the case. His conviction and sentence are therefore affirmed.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Judge